No. 88-1719

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL NO. 391,
Petitioner,
v.
THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities is the representation of the interests of its member-employers

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36(2). Letters of consent are on file with the Clerk of the Court.

in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court. E.g., *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. ——, 100 L. Ed. 2d 410 (1988); *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis Chalmers v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

The question presented in this case is whether employees have a Seventh Amendment right to a jury trial in a "hybrid" Section 301/duty of fair representation ("DFR") case. This issue is of vital concern to the Chamber and its members for three reasons. First, such hybrid suits are often brought against employers, either alone or as co-defendants with unions. In either situation, an employer can be liable only if the plaintiff-employee can prevail on both of the determinative issues in such cases—i.e., the union's alleged breach of its duty of fair representation and the employer's alleged violation of the collective bargaining agreement. Thus, employers have an obvious stake in the question of whether such issues must be tried to a jury.

Second, a hybrid § 301/DFR action represents an assault on the exclusive remedies and procedures embodied in grievance-arbitration provisions of collective bargaining agreements. As such, and because principles of exclusivity and finality relating to contractual grievance-arbitration procedures have served employers and the nation well, employers have a legitimate interest in resisting any encroachment on those principles.

Third, employers have an independent interest in the manner in which hybrid § 301/DFR suits are handled

even when those suits are brought solely against unions. Unions faced with the prospect of jury trials in hybrid suits can justifiably expect higher litigation costs connected with such actions. They might also expect that juries may tend to favor the individual over the organization and may not fully appreciate the range of reasonableness that must be accorded unions' actions under our federal labor policies. Thus, unions may become even more reluctant to settle or abandon non-meritorious employee grievances short of arbitration because of the increased costs and uncertainties that would be associated with employee challenges to such decisions in hybrid suits. As a result, grievance-arbitration provisions of collective bargaining agreements will become substantially more costly to employers.

In view of these considerations, it is clear that the issue in this case is just as important to employers as it is to the unions with whom they deal. Accordingly, as a representative of many of those employers, the Chamber submits this brief *amicus curiae* in support of the Petitioner.

SUMMARY OF THE CASE

This hybrid § 301/DFR case was commenced in 1983 by a group of employees of McLean Trucking Company ("McLean") who had recently transferred to McLean's terminal in Winston-Salem, North Carolina. The employees alleged that McLean had violated its collective bargaining agreement by manipulating the contractual layoff and recall procedures in such a way as to give job preference to other Winston-Salem employees. Pet. App. 33-35. In addition, the employees alleged that Teamsters Local 391 ("the Union") had acquiesced in McLean's violation of their contract rights and had failed to fairly represent them in the contractual grievance and arbitration proceedings that resulted in a determination that McLean did not violate the contract. *Id.*

Based on these alleged facts, the employees contended that the arbitration awards finding no contract violation should be set aside and that they were entitled to injunctive and monetary relief against both McLean and the Union. Specifically, the complaint sought declaratory and injunctive relief, reinstatement, lost wages and benefits, punitive damages, damages for emotional distress, and attorney's fees and costs. *Id.* at 35. The claims for punitive and emotional distress damages were subsequently struck by the district court. Petition at 7.

As it stands before this Court, the instant case presents only one defendant and one issue—whether the plaintiff-employees have a right to a jury trial on their claims against the Union. McLean was voluntarily dismissed from the suit after the district court stayed all proceedings as to McLean because the company filed a bankruptcy petition. Petition at 6 n. 1. The jury trial issue comes to the Court via the Fourth Circuit's conclusion, on interlocutory appeal, that the Seventh Amendment of the Constitution ensures the employees' right to a jury trial on their claims. Pet. App. at 32-52.

SUMMARY OF ARGUMENT

The history and nature of hybrid § 301/DFR actions establishes a background supporting the inevitable conclusion that such actions are equitable rather than legal in nature; that the remedies to be sought and awarded are equitable; and that the care required of the trial court in order to ensure that such actions do not disrupt important labor policies is not likely to be found in the jury room.

Hybrid § 301/DFR actions provide a limited means by which employees can avoid the finality and exclusivity of the contractual grievance-arbitration procedures that are so favored in our nation's labor policy. Whether viewed as unitary claims or separate § 301 and DFR claims, this Court's decisions suggest very strongly that

the closest analogies to hybrid suits are actions in equity which do not require a jury trial under the Seventh Amendment. Indeed, the Court itself has found such actions to be most closely analogous to suits to vacate arbitration awards and unfair labor practice proceedings under the NLRA, both of which are equitable in nature.

Furthermore, the result is the same if the two claims or issues in a hybrid suit are analyzed separately. While the closest analog to a DFR claim is an unfair labor practice proceeding, equitable actions against a fiduciary for a breach of a trust relationship are the closest analog in terms of the actions existing before the merger of law and equity courts. The fair representation duty itself obviously has both statutory and equitable origins, and the union-employee relationship is much more closely akin to a trustee-beneficiary relationship than it is to an attorney-client relationship, in terms of both the autonomy and discretion accorded the fiduciary and the power of the employee-beneficiary to end or modify the relationship. Finally, there are sound labor policy reasons to view DFR claims as equitable in nature. The range of discretion that must be accorded unions under our nation's labor policies dictates that their decisions and actions be judged by the flexible standards that are the hallmark of equity jurisdiction.

The contract claim in a hybrid § 301/DFR action is also equitable in nature. Certainly it cannot be compared to an ordinary breach of contract action at common law. Instead, since the contract claim either overrides or substitutes for an arbitration award, the claim should be viewed as an equitable action to vacate an arbitration award or, alternatively, its legal or equitable nature should be determined by the nature of the arbitration proceeding for which it substitutes. The latter alternative produces a firm conclusion that the claim is equitable, because an arbitrator's role in interpreting collective bargaining agreements is of a quintessentially equitable nature.

The remedies available in hybrid suits are also equitable in nature. Certainly the fact that monetary relief is sought does not *ipso facto* make the remedy "legal." Indeed, the monetary make-whole relief available on the DFR and contract claims is the same kind of relief that is available under Title VII of the Civil Rights Act and the National Labor Relations Act, and the remedies under those statutes are acknowledged to be equitable. Furthermore, the parties to collective bargaining agreements containing arbitration provisions can be viewed as having contemplated and agreed upon a regime of equitable rather than legal remedies for any contract violations. Certainly arbitrators possess and employ extraordinarily broad flexibility and imagination in fashioning remedies to meet and accommodate the parties' respective needs and interests. Because the contract claim in a hybrid action is a substitute for this arbitral process, the remedies available for such claims should be considered correspondingly equitable in nature.

Finally, the labor policy implications of hybrid suits counsel against jury trials. Unions must be accorded substantial discretion and latitude in grievance handling in order for the private dispute resolution mechanisms to remain viable. Thus, it is critical that DFR claims be considered and decided with a keen appreciation for the breadth of discretion accorded unions and the labor policies that dictate that latitude. Judges rather than jurors can best perform that function.

ARGUMENT

The Seventh Amendment Does Not Require A Jury Trial On The Labor Relations Issues Presented By Hybrid § 301/DFR Lawsuits

This Court has never addressed the right to a jury trial in private actions involving employee-union-management relations governed by the National Labor Relations

Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*[2] Indeed, since the NLRA preempts most lawsuits which implicate the rights and obligations under that statute,[3] actions which could possibly present the jury trial issue are limited. However, since the Court has held that employees have a right to pursue the type of hybrid § 301/DFR suits this case represents (*Vaca v. Sipes*, 386 U.S. 171 (1967)), it must now determine whether the Seventh Amendment gives employees the right to have such claims determined by a jury rather than the court.

Before turning to a discussion of the Court's traditional Seventh Amendment tests, however, it is important to consider the source and nature of hybrid § 301/DFR actions in terms of their place in the fabric of our nation's labor laws. These actions derive from both the rights and restrictions of the NLRA (or, as amended by Taft-Hartley, the Labor Management Relations Act ("LMRA")). The Court has long recognized that the fundamental predicate of this statute is to foster a system in which employees, through their collective efforts, may come to the bargaining table and negotiate "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960). The outcome of that process—the collective bargaining agreement—thus enjoys an important position in our federal policy. *Id.* at 578 ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement.").

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[2] In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), the Court did hold that there was no Seventh Amendment right to jury trial in proceedings to enforce the NLRA.

[3] See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-751 (1985) (describing the two NLRA preemption doctrines which prohibit actions regulating conduct that is arguably prohibited or protected by the NLRA, or conduct that Congress meant to be unregulated by the NLRA).

The Court has also long recognized that the grievance-arbitration provisions of such bargaining agreements are particularly sacrosanct. Since the *Steelworkers Trilogy* decisions in 1960,[4] the Court has emphasized that the express policy of the LMRA[5] "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg. Co., supra,* 363 U.S. at 566. Thus, for example, courts may not review the merits of an arbitration award either directly (*Enterprise Wheel & Car Corp., supra,* 363 U.S. at 596) or indirectly through the guise of judging the award under some nebulous public policy standard. *United Paperworkers v. Misco, Inc.,* 484 U.S. ——, 98 L. Ed. 2d 286 (1987).

Consistent with this policy, the Court has made clear that grievance-arbitration provisions can be given their necessary protection only if parties are not permitted to bypass those provisions when they are available. Thus, although Section 301 of the LMRA establishes federal court jurisdiction over suits alleging violations of collective bargaining agreements,[6] the Court long ago held that such suits could not displace the contractual grievance-arbitration procedures:

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[4] *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[5] Section 203(d) of the LMRA, 29 U.S.C. § 173(d), states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application and interpretation of an existing collective-bargaining agreement. . . .

[6] Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. . . . Union interest in prosecuting employee grievances is clear. . . . Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965), *quoting Teamsters v. Lucas Flour,* 369 U.S. 95, 103 (1962).

Hybrid § 301/DFR actions provide a limited exception to this rule which otherwise forecloses resort to the courts when a collective bargaining agreement provides for exclusive grievance-arbitration provisions. In *Vaca v. Sipes,* 386 U.S. 171 (1967), the Court held that an employee would be permitted to pursue his bargaining agreement rights in court, despite exclusive contract procedures, if the employee could prove that the union had breached its duty of fair representation—i.e., had acted in an arbitrary, discriminatory or bad faith manner in failing to process the employee's contractual grievance. 386 U.S. at 190-191. Thereafter, in *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976), the Court concluded that the same rule should apply even if there had actually been a final and binding arbitration award denying the

employee's grievance, so long as the employee could show that the union's breach of its duty "seriously undermine[d] the integrity of the arbitral process." 424 U.S. at 567.

Hence, from these precedents, the hybrid § 301/DFR suit had its genesis. In such suits, employees may sue either their employer or their union, or both, but in either situation the elements of the suit are the same[7] and the employee may obtain remedies that would otherwise be foreclosed by the final and exclusive contractual grievance-arbitration provisions. We show below that the nature of the rights and remedies in these lawsuits, as well as federal policy considerations, compel the conclusion that the Seventh Amendment does not require a jury trial in such actions.

A. The Seventh Amendment Standards

The Seventh Amendment to the United States Constitution provides that in "[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." The Seventh Amendment right attaches not merely to claims the common law actually recognized, but also to new causes of action in which legal, as opposed to equitable, rights and remedies are to be determined. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970), *citing Parsons v. Bedford*, 3 Pet. 433, 447 (1830). See also *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (Seventh Amendment applies to actions enforcing statutory rights if the statute creates legal, rather than equitable, rights and remedies enforceable in ordinary courts of law).

Thus, the Seventh Amendment question turns on an historical analysis of whether the issues to be decided would have been considered in courts of equity or courts of law prior to the merger of law and equity. *Id.* This determination requires a two-fold analysis:

> First, we compare the . . . action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

Tull v. United States, 481 U.S. 412, 417-418 (1987). Application of these standards leads to the conclusion that a jury trial is not required for hybrid § 301/DFR actions.

B. Hybrid § 301/DFR Actions Are More Analogous To Equitable Rather Than Legal Proceedings

The first prong of the Seventh Amendment test requires a court to assess whether § 301/DFR proceedings are more like pre-merger legal actions or pre-merger equitable actions. This Court itself has twice examined the nature of these actions vis-a-vis their common law or statutory counterparts. *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981); *DelCostello v. Teamsters*, *supra*.[8] The Court's analysis in both cases suggests very

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[7] Although employees typically sue both union and employer in hybrid § 301/DFR suits, employees are free to sue only one of those parties. *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). However, the employee may not obtain relief against either party, whether sued singly or collectively, unless he or she can prove both elements of the hybrid claim—i.e., the union's DFR breach and the employer's violation of the bargaining agreement. *Id.*

Thus, every hybrid action contains the same elements no matter who is being sued. While these elements might be termed either "claims" or "issues" depending upon whether employer and union are sued collectively or singly, this brief usually refers to the two "claims" in a hybrid action because typically both parties are sued. However, it should be understood that even if only one party is sued, every hybrid action against an employer contains a "DFR claim" as well as a "contract claim" and, by the same token, every hybrid suit against a union contains a "contract claim" as well as a "DFR claim."

[8] While this inquiry was undertaken for purposes of determining the appropriate statute of limitations for hybrid actions, such a

strongly that, whether viewed as a unitary claim or as separate § 301 and DFR claims, the closest analogies to hybrid suits are actions in equity.

In both *Mitchell* and *DelCostello*, the Court recognized that, whether a hybrid suit is brought against an employer or a union, the suit is an "amalgam," based on both a Section 301 action for bargaining agreement violations and an alleged breach of the duty of fair representation implied under the NLRA. *DelCostello*, 462 U.S. at 158 n. 12; see also *Mitchell*, 451 U.S. at 61-63. Although "as a formal matter" two causes of action are present, "the two claims are inextricably interdependent." *DelCostello*, 462 U.S. at 164.

In *Mitchell*, the Court soundly rejected any suggestion that this "amalgam" suit against an employer could be likened to an ordinary breach of contract action. 451 U.S. at 61-62. Instead, because the suit amounts to a direct challenge to the private settlement of disputes under a collective bargaining agreement, the Court concluded that the suit is "more analogous to an action to vacate an arbitration award than to a straight contract action." *Id.* at 62.

The Court adhered to this conclusion in *DelCostello*, which involved the appropriate statute of limitations in a hybrid action against a union. 462 U.S. at 165. Nevertheless, the Court concluded that, as to the union, a hybrid suit was more akin to an unfair labor practice under the NLRA. 462 U.S. at 169-172. The Court had previously observed in *Mitchell* that a DFR claim "is more a creature of 'labor law' . . . than it is of general contract law" (451 U.S. at 63), and in *DelCostello* it confirmed that conclusion.

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determination normally involves identification and use of the statute of limitations of the most closely analogous state cause of action. *DelCostello*, 462 U.S. at 158.

In short, the Court's previous decisions dealing with hybrid § 301/DFR lawsuits viewed the closest analogy for such suits as either an action to vacate an arbitration award and/or an unfair labor practice proceeding under the NLRA. See also *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988) (hybrid § 301/DFR actions are best analogized to suits to vacate arbitration awards or to unfair labor practice proceedings for purposes of Seventh Amendment analysis). Since both of those latter actions are clearly equitable in nature,[9] jury trials should not be available for hybrid suits under the Seventh Amendment. *Leach, supra.*

Moreover, this conclusion is no different if one focuses on the nature of the underlying claims and issues in hybrid actions, as some cases have suggested must be done under Seventh Amendment analysis.[10] In this regard, it is noteworthy that courts considering the nature of underlying claims in hybrid suits have reached sharply conflicting results—some finding that the contract claim is legal but the DFR claim equitable, some finding the DFR claim legal and the contract claim equitable, and some finding both claims legal or both claims equitable.[11]

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[9] *Leach v. Pan American World Airways, supra,* 842 F.2d at 288 n. 5, 290, and cases cited therein. This Court has itself determined that unfair labor practice proceedings and their remedies are equitable in nature. *NLRB v. Jones & Laughlin Steel, supra,* 301 U.S. at 48-49.

[10] See, e.g., *Deringer v. Columbia Transportation Div., Oglebay Norton Co.*, 866 F.2d 859, 862 (6th Cir. 1989).

[11] For example, *Leach* found that both claims are equitable, whereas the Fifth and Eighth Circuits, prior to this Court's *Mitchell* and *DelCostello* decisions, concluded that both claims are legal. *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979); *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975). The Sixth Circuit has suggested that contract claims in a hybrid suit are equitable in nature, whereas the DFR claims are legal. *United Transportation Union, Local 74 v. Consolidated Rail Corp.*, —— F.2d ——, 1989 WL 83845, p. 6 (6th Cir. 1989) ("We do not find persuasive the argument that the equitable nature of claims against

The Chamber submits, however, that both aspects of the hybrid action are equitable in nature.

1. *The DFR Claim*

The duty of fair representation claim involved in a hybrid suit clearly has equitable origins. Although the closest specific analog to a DFR claim is obviously the NLRA unfair labor practice that the Court found compelling in *DelCostello*, the fair representation duty arising under that statute itself has roots in equity. First recognized in 1944, the duty derives from the theory that the exclusive representative status granted unions under the NLRA carries with it the responsibility to discharge that representation in a faithful and non-arbitrary manner. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944) (recognizing that a union's duty arises not only from statutory exclusive representative status, but also from the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf."). See also *Hines*, 424 U.S. at 564; *Bowen v. United States Postal Service*, 459 U.S. 212, 226 (1983).

Given these underpinnings, the duty of fair representation plainly bears a striking resemblance to the fiduciary duty in the nature of a trust relationship which has historically been viewed as a creature of equity. See, e.g., *Atwood v. Pacific Maintenance Ass'n*, 432 F. Supp. 491, 497 (D. Or. 1977), *aff'd on other grounds*, 657 F.2d 1055 (9th Cir. 1981) (no right to jury trial because breach of DFR similar to breach of fiduciary duty enforceable in equity). See also Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 21 (1958) (The relationship created by a collective bargaining agreement may be "compared to a trust with a

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an employer compels us to view the derivative claims against a union also to be equitable. . . .").

chose in action as the *res* . . .[and in which] the bargaining representative, which is subject to fiduciary obligations, holds the employer's promises in trust for the benefit of the individuals.").[12]

Moreover, the Chamber submits that the trustee analogy is considerably more apt than the attorney-client analogy that has been favored by some members of the Court. See *Mitchell*, 451 U.S. at 74 (Stevens, J., concurring and dissenting) (DFR claim similar to legal malpractice); *DelCostello*, 462 U.S. at 175 (O'Connor, J., dissenting) (same). In an attorney-client relationship the client maintains ultimate and complete control over all of his or her rights, can direct the attorney which rights should be asserted and how, and can walk away from the relationship should disagreement or dissatisfaction arise.

The union-employee relationship, on the other hand, like the trustee-beneficiary relationship, is entirely different. In these latter relationships, the interests of the employee and beneficiary are placed wholly in the power of the fiduciary, who exercises tremendous autonomy and discretion in how he or she represents those interests. If the employee and trust beneficiary are dissatisfied with how their interests are represented, they are not free simply to reclaim their interests and sever the re-

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[12] Although the Eleventh Circuit did not expressly analogize the DFR claim to a breach of a fiduciary obligation in *Leach*, the court recognized the equitable roots of the DFR doctrine:

> [W]e note that from their inception [DFR claims] have embodied certain traditional notions associated with equity jurisdiction. Equity has been defined as "justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law."

842 F.2d at 290. Noting the *Steele* Court's explication of the derivation of the fair representation duty, the Eleventh Circuit concluded that "the action involves rights and remedies of the sort traditionally enforced in equity." *Id., quoting Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).

lationship. Instead, they are limited to attacking the manner in which the fiduciary has exercised his or her discretion. And since the exercise of such discretion cannot be judged by any hard and fast legal rules or precepts, it is necessarily judged in equity. In short, the fair representation duty in a union-employee relationship is, quintessentially, in the nature of a trust.

Finally, there are sound labor policy reasons to view the DFR claims as equitable in nature and determinable by courts rather than juries. As more fully discussed in Section D, *infra*, this Court has often emphasized that our national labor policy requires that unions be accorded substantial discretion and flexibility in their representation activities. E.g., *Vaca*, 386 U.S. at 190-192; *Mitchell*, 451 U.S. at 66, n. 2 (Stewart, J., concurring), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("Necessarily [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents."). The limits of that discretion will have to be judged in the myriad of factual circumstances in which DFR claims arise, and will have to be determined with an eye toward the federal labor policy that protects that discretion. These judgments, the Chamber submits, will necessarily be made on the basis of "natural reason or ethical insight . . . independent of the formulated body of law." *Leach*, *supra*, 842 F.2d at 290.

2. *The Contract Claim*

The Chamber submits that the contract claim involved in a hybrid § 301/DFR action is also of an equitable nature. Although the Respondents will undoubtedly contend that such claims are analogous to common law breach of contract claims which are legal in nature, this Court's decisions simply do not permit such a simplistic approach to claims involving collective bargaining agreements which contain binding grievance-arbitration provisions.[13]

First, in both *Mitchell* and *DelCostello* this Court specifically rejected the contention that the contract claim in a hybrid action could be analogized to an ordinary breach of contract action. Because binding grievance-arbitration provisions stand between employees and judicial relief, the suit is "not a straightforward breach-of-contract suit under § 301, as was *Hoosier*, but a hybrid § 301/fair representation claim, amounting to a 'direct challenge to the private settlement of disputes under [the collective bargaining agreement].'" *DelCostello*, 462 U.S. at 165, *quoting Mitchell*, 451 U.S. at 66 (Stewart, J., concurring).

Equally important, moreover, and aside from the necessity of effectively vacating a binding contract resolution, the contract claim, standing alone, should be viewed as involving equitable rights and remedies where the contract provides for binding arbitration. In this regard, the Court's decisions make clear that a collective bargaining agreement cannot be viewed as an ordinary common law contract:

> [The collective bargaining agreement] is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or a particular plant.

United Steelworkers v. Warrior & Gulf, 363 U.S. at 578-579.

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[13] We realize that this Court itself analogized a Section 301 suit to common law breach of contract actions in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 (1966). However, the collective bargaining agreement involved in *Hoosier* did not contain an arbitration provision and, as shown in the text following this footnote, that analogy is not appropriate when an agreement provides for arbitration.

This point was more recently reiterated in *Bowen v. United States Postal Service*, where the Court rejected a union argument regarding its liability in a hybrid suit because, in the Court's view, the argument

> treats the relationship between the employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common-law principles. . . . Rather, it is an agreement creating relationships and interests under the federal common law of labor policy.

459 U.S. at 220 (footnote omitted).

Aside from the nature of the collective agreement itself, it is also well-recognized that arbitrators play a unique role in administering the bargaining agreement—a role which, the Chamber submits, is the essence of the Chancellor dispensing equity. Indeed, the Court itself has described the role of the Chancellor and the role of the arbitrator in strikingly similar terms. For example, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court described the Chancellor's role as follows:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-330. A similar description of the arbitrator's role was offered in *Warrior & Gulf*:

> A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . [It is] "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their

> application; and some do little more than leave problems to future consideration with an expression of hope and good faith." . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.
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> * * * *
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> The labor arbitrator performs functions which are not normal to the courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but . . . such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.

363 U.S. at 580-582 (citations omitted). See also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 ("When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem.").

These passages demonstrate that an arbitrator's role is one that is closely akin to that of equity jurisdiction, which "eschews mechanical rules . . . [and] depends on flexibility." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), *quoting Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Just as a collective bargaining agreement can be viewed as "the charter instrument of a system of industrial self-government" (Brennan, J., concurring, in *Steelworkers Trilogy*, 363 U.S. at 570), the arbitrator can be viewed as the Chancellor who sits to fill in the interstices of the written charter and to adjust the relations and actions of the parties as the charter, fairness and equity require.

Seen in this light, employers and unions who enter into collective bargaining agreements with arbitration

provisions have, in a very real sense, committed their rights and obligations under those agreements to a determination in equity. Absent a rule in which all contract claims in hybrid § 301/DFR actions are remanded for arbitration—a rule this Court rejected in *Vaca*, 386 U.S. at 196—the only remaining alternative consistent with the parties' intent and contractual understandings is a determination that alleged violations of the agreement should be determined in equity courts.

C. The Make-Whole Relief In Hybrid § 301/DFR Suits Is Equitable In Nature

The second factor of the Seventh Amendment analysis requires that a court consider the nature of the remedies sought. The Chamber submits that the relief available in this and other hybrid § 301/DFR actions is equitable make-whole relief.

First, the fact that employees in hybrid suits are seeking monetary relief does not automatically mean they are seeking "legal" relief. See *Curtis v. Loether, supra*, 415 U.S. at 196 (award of monetary relief need not be "legal" relief). Indeed, this Court has specifically held that the make-whole relief provided by Title VII of the Civil Rights Act of 1964 is equitable in nature, including the kind of backpay and payment for lost benefits that is typically at issue in hybrid § 301/DFR cases. *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 415-419. So too is the similar make-whole relief under the NLRA, on which Title VII's remedial provisions were modeled. *NLRB v. Jones & Laughlin Steel, supra*, 301 U.S. at 48. In so holding, the Court has expressly recognized "the 'historic power of equity' to award lost wages." *Albemarle Paper Co.*, 422 U.S. at 416.

These cases are pertinent here because the Court has made clear that the purpose of monetary relief for DFR claims in hybrid actions is "to make the injured employee whole." *Electrical Workers v. Foust*, 442 U.S. 42, 49 (1979). See also *Bowen v. United States Postal Service*, 459 U.S. at 222. Given the strong "family resemblance" between DFR claims in hybrid suits and NLRA unfair labor practices involving fair representation (*DelCostello*, 462 U.S. at 170), the make-whole relief available in private DFR actions should be similar to the make-whole relief available under the NLRA—relief that the *Jones & Laughlin Steel* case held to be equitable in nature.

Indeed, the *Foust* Court recognized that the remedies available in DFR suits should be determined by considerations that also govern the statutory remedial scheme. In rejecting the availability of punitive damages in an analogous DFR case under the Railway Labor Act, the Court stated:

> Congress has not specified what remedies are available in these [DFR] suits. Our function, therefore, is to implement a remedial scheme that will best effectuate the purpose of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace.

442 U.S. at 47 (footnote omitted).

Thus, although *Vaca* establishes that the NLRA does not preempt private DFR suits, the Court should be guided by the NLRA remedial scheme in determining the nature of the remedies available in private DFR actions. And this is particularly true inasmuch as the Court has made clear that the preemption doctrine emanates in part from the fact that the "range and nature of the remedies that are and are not available" under the NLRA are integral to the scheme of collective bargaining that statute was intended to foster. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). See also *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986); *Connell Construction Co. v. Plumbers & Steamfitters Local Union*

No. 100, 421 U.S. 616, 635 (1975).[14] As a consequence, unless the remedies available in private DFR suits are carefully controlled and similar to NLRA remedies, they might run afoul of this Court's preemption principles. *Cf. Motor Coach Employees v. Lockridge*, 403 U.S. at 301 (noting that the Congressional policies the preemption doctrine seeks to promote will be "swallowed up" unless courts considering DFR claims strictly maintain the distinction between unions' honest, mistaken conduct, on the one hand, and deliberate and severely hostile treatment on the other); *Farmer v. Carpenters*, 430 U.S. 290, 304-306 (1977) (NLRA does not totally preempt employee's tort claim against union for intentional infliction of emotional distress, but claim is preempted insofar as it is premised on acts of discrimination covered by NLRA, and furthermore, court must assure damages awarded are not excessive).

In short, the DFR claims in a hybrid suit parallel the DFR claims in statutory unfair labor practice proceedings, and both common sense and national labor policy suggest that the remedies for breach of that duty should be the same. Accordingly, the remedies for hybrid DFR claims should be considered equitable for purposes of Seventh Amendment analysis.

The same conclusion should be reached regarding the remedies for alleged violations of the collective bargaining agreement in hybrid actions. First, such actions al-

[14] Nor is this consideration made less compelling by the *Foust* Court's indication that the "compensation principle" was one of the reasons *Vaca* held private DFR claims not to be preempted. See *Foust*, 442 U.S. at 49 n. 12. The portions of the *Vaca* decision cited by the Court did not express concern that the NLRA could not provide the necessary make-whole relief. Rather, the Court's concern was that the NLRB's General Counsel might refuse to issue DFR complaints in cases where the employee injury was insubstantial, and that such a determination would be within the General Counsel's unreviewable discretion. See *Vaca*, 386 U.S. at 182-183 and n. 8.

ways effectively require vacating arbitration awards or otherwise relieving employees from the finality and exclusivity attaching to the contractual grievance procedure. As pointed out in Section B, *supra*, such remedies are equitable in nature.

Second, the monetary relief available on such claims—backpay and restoration of benefits—can be viewed as equitable for the same reasons that such remedies are equitable in Title VII and NLRA proceedings.

Finally, the parties to collective bargaining agreements containing arbitration provisions can be viewed as having agreed to the imposition of equitable remedies for the same reasons they can be viewed as having agreed to have their contract claims determined in equity proceedings. See Section B, *supra*. In this regard, "[t]he distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use." 1 J. Pomeroy, *Equity Jurisprudence*, § 109, at 140. Equitable remedies, by contrast, are highly flexible and adapt to the circumstances. Thus, "[e]quity eschews mechanical rules . . . [and] depends on flexibility . . .," and an equitable remedial scheme "implicitly recognizes that there may be cases calling for one remedy but not another. . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. at 415-416, 417 (citations and footnotes omitted). See also *Hecht Co. v. Bowles, supra*.

It is clear from these passages that parties who have agreed to contractual arbitration provisions contemplate a regime of equitable rather than legal remedies:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. at 597.

Moreover, anyone engaged in the arbitral process cannot but be struck by the flexibility that arbitrators in fact bring to bear in order to provide remedies that "do justice" in the particular circumstances of any given grievance. For example, arbitrators routinely convert employee discharges into disciplinary suspensions without pay when they believe that the discharge penalty is too severe under all the circumstances (see, e.g., *General Electric Corp.*, 69 LA (BNA) 707 (Arbitrator Jedel, 1977)), and they often impose far more imaginative remedies in order to protect the parties' respective and legitimate interests in widely varying circumstances. See, e.g., *Gamble-Skogmd, Inc.*, 71 LA (BNA) 1151, 1154 (Arbitrator Weiss, 1978) (where both company and union violated no-strike/no-lockout clause, employees ordered reinstated but without pay because "their hands are not *that* clean," and employees ordered to make up work time lost due to strike by working overtime at straight-time rates insofar as permissible under Fair Labor Standards Act); *3-M Company*, 63 LA (BNA) 114, 118 (Arbitrator Purdom, 1974) (discharged employee reinstated without backpay, but company ordered to make two months' backpay available for grievant to use for purposes of attending remedial educational program; if grievant does not attend educational program, union and employer shall decide how best to use funds to advance educational opportunities of unit employees); *Armstrong Cork Co.*, 56 LA (BNA) 527, 530 (Arbitrator Wolf, 1971) (discharged alcoholic employee reinstated without backpay, but for six months must furnish personnel director evidence that he is regularly attending Alcoholics Anonymous); *Allied Maintenance Co.*, 46 LA (BNA) 1014, 1018 (Arbitrator Sembower, 1966) (employer must reinstate discharged grievant without backpay if and when grievant can supply certificate from

psychiatrist indicating that he has undergone diagnosis and effective treatment).

Thus, in a very real sense, parties agreeing to binding arbitration provisions contemplate that remedies for violating the bargaining agreement will be determined by the arbitrator's application of principles developed in the courts of equity. As a consequence, remedies in the judicial proceedings that displace arbitration in hybrid § 301/DFR suits should likewise be determined in equity.

D. Labor Policy Considerations in Hybrid Cases Counsel Against a Seventh Amendment Right

The Chamber submits that jury determination of DFR claims poses a significant risk to the national labor policies underlying the NLRA. Time and again this Court has emphasized that those policies require that unions be given substantial latitude and discretion in dealing with employee grievances. E.g., *Vaca*, 386 U.S. at 191-193; *Hines*, 424 U.S. at 563-564; *Lockridge*, 403 U.S. at 301; *Foust*, 442 U.S. at 48-52. As the Court observed in *Foust*:

> [U]nion discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. Without these screening and settlement procedures, . . . the costs of private dispute resolution could ultimately render the system impracticable.

442 U.S. at 51, *citing Vaca*, 386 U.S. at 191-193. In view of these concerns, the Court has made clear that union DFR liability must be limited to situations in which the union's conduct is "arbitrary, discriminatory or in bad faith," as opposed to merely negligent or inattentive. *Vaca*, 386 U.S. at 190.

As stated by the concurring Justices urging preemption in *Vaca*, however, in applying these standards one is

> concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit. . . . The nuances of union-employee and union-employer relationships are infinite and consequential, particularly when the issue is as amorphous as whether the union was proved guilty of "arbitrary or bad-faith conduct" which the Court states as the standard applicable here.

386 U.S. at 202-203. Based on this assessment, the concurring Justices concluded that "judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee . . . [are] precisely and especially the kind of judgment[s] that Congress intended to entrust to the [NLRB] . . . ." *Id.* at 202.

The *Vaca* majority refused to find the NLRB's jurisdiction exclusive, but the concurring Justices' observations nevertheless remain relevant to the questions before the Court.[15] While judges might be expected to make DFR determinations with a keen eye toward national labor policy and the latitude to be accorded unions, juries, even when properly instructed, may not fully appreciate the wide range of reasonableness that attaches to unions' actions under the nation's labor laws. As a consequence, committing such determinations to juries might prejudice the courts' ability to "strictly maintain" the "dis-

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[15] *Vaca* held that DFR claims are not preempted by the NLRA under this Court's *Garmon* doctrine, which normally preempts actions regulating conduct that is arguably protected or arguably prohibited by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Nevertheless, the Court's refusal to find such claims preempted does not mean that the concerns and principles animating the preemption doctrine are entirely irrelevant. Thus, although hybrid DFR claims can obviously proceed, the Court should fashion remedies and procedures relating to such claims that will minimize the risk of violence to national labor policies underlying the NLRA. *See Motor Coach Employees v. Lockridge* and *Farmer v. Carpenters*, as cited *supra* at p. 22.

tinction . . . between honest, mistaken conduct, on the one hand, and severely hostile and irrational treatment, on the other. . . ." *Lockridge*, 403 U.S. at 301. If that is the case, then provision of a jury trial on DFR claims might "swallow up" the "congressional policies Garmon seeks to promote" (*id.*)—i.e., the enhancement of collective bargaining through "uniform application of . . . substantive rules and [avoidance of the] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . ." *Garner v. Teamsters Union*, 345 U.S. 485, 490 (1953).

Finally, the possibility that juries may consider DFR claims without a proper appreciation for the dictates of national labor policy will also inject increased uncertainty into the litigation of DFR claims. This fact, coupled with the increased litigation costs associated with jury trials, could curtail the union discretion that this Court has found essential to the proper functioning of the collective bargaining system established by Congress. As the Court observed in *Foust*, in rejecting an employee's claim for punitive damages in a DFR suit:

> [T]he threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements.

442 U.S. at 51-52. See also, e.g., *Bowen v. United States Postal Service*, 459 U.S. at 241-242 (Justices White, Marshall, Blackmun and Rehnquist, concurring in part and dissenting in part) ("[S]ince the practical consequence of today's [backpay apportionment] is that unions will take many unmeritorious grievances to arbitration simply to avoid exposure to the new breach-of-duty liability, the Court's rule actually impairs the ability of the grievance machinery to provide for orderly dispute resolution."). The same would be true, the Chamber submits, if jury trials are permitted on hybrid DFR claims.

In sum, labor policy considerations counsel great circumspection in determining the rights and remedies to be available under hybrid § 301/DFR suits, as well as great circumspection in committing the issues to a jury. Accordingly, the Court should determine that the rights and remedies are equitable in nature and that they are to be tried to the courts.

CONCLUSION

For the foregoing reasons, the Chamber respectfully submits that the Seventh Amendment of the United States Constitution does not require a trial by jury in hybrid § 301/DFR lawsuits.

Respectfully submitted,

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